No. 92-515

In the Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF WISCONSIN, PETITIONER

v.

TODD MITCHELL

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether it violates the First Amendment for a State to authorize an enhanced criminal sentence when the defendant selects his victim because of the victim's race, religion, color, or other protected status.

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INTEREST OF THE UNITED STATES

This case presents the question whether the First Amendment permits the enhancement of a criminal sentence when the defendant has selected his victim because of the victim's race, religion, color, or other protected status. A variety of federal criminal laws punish intentional discrimination on the basis of race, religion, or other characteristics. See, *e.g.*, 18 U.S.C. 242, 243, 245; 42 U.S.C. 3631. And the Sentencing Guidelines permit an upward adjustment in the offense level when the victim's racial or ethnic characteristics make him particularly vulnerable and thereby played a significant role in the defendant's selection of his victim. See Sentencing Guidelines § 3A1.1 (covering offenses where the victim's vulnerability contributed to the defendant's decision to commit the offense); *United States* v. *Salyer*, 893 F.2d 113, 115-

116 (6th Cir. 1989).[1] Because this case has implications for the constitutionality of those measures and for federal antidiscrimination law generally, the United States has a significant interest in its outcome.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law * * * abridging the freedom of speech * * *." Wisconsin Statute § 939.645 (1989-90) is set forth in the appendix to this brief.[2]

STATEMENT

1. On October 7, 1989, respondent and several other black men and boys were gathered at an apartment complex in Kenosha, Wisconsin. Respondent was 19 at the time and was among the older persons in the group. After the group had discussed a scene in the movie "Mississippi Burning" in which a white

[1] In addition, Congress in 1990 enacted the Hate Crime Statistics Act requiring the Attorney General to acquire data "about crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity." Pub. L. No. 101-275, § 1(b)(1), 104 Stat. 140, codified at 28 U.S.C. 534 note. In 1992, the House passed a bill that would direct the Sentencing Commission to promulgate guidelines to provide sentencing enhancements for "hate crimes," *i.e.*, crimes "in which the defendant's conduct was motivated by hatred, bias, or prejudice, based on the actual or perceived race, color, religion, national origin, ethnicity, gender, or sexual orientation of another individual or group of individuals." H.R. 4797, 102d Cong., 2d Sess. § 2(b) (1992). A counterpart bill was introduced in the Senate, S. 2522, 102d Cong., 2d Sess. (1992), but did not pass.

[2] In 1992, the Wisconsin legislature amended Section 939.645 in several respects. See Pet. App. A12 n.12. The amended provision is not at issue in this case.

man beat a black boy who was praying, respondent stated: "Do you all feel hyped up to move on some white people?" Soon thereafter, a 14-year-old white male, Gregory Riddick, walked by the apartment complex on the opposite side of the street from the group. Respondent said: "You all want to fuck somebody up? There goes a white boy; go get him." After counting to three, respondent pointed in Riddick's direction. Pet. App. A3, A54.

Several members of the group ran toward Riddick, knocked him down, severely beat him, and stole his tennis shoes. Riddick was rendered unconscious and remained in a coma for four days. He suffered extensive injuries, including brain damage. Pet. App. A3, A54-A55.

2. After a jury trial, respondent was convicted of aggravated battery, in violation of Wis. Stat. §§ 939.05 and 940.19(1m). That offense carries a maximum sentence of two years' imprisonment. Wis. Stat. §§ 940.19(1m), 939.50(3)(e). Because the jury also found that respondent had intentionally selected the victim because of his race, Pet. App. A55, the potential maximum sentence for respondent's crime was increased to seven years under Wis. Stat. § 939.645(2)(c) (1989-90), which authorizes such enhancement when the defendant "[i]ntentionally selects the person against whom the crime * * * is committed * * * because of the race, religion, color, disability, sexual orientation, national origin, or ancestry of that person * * *." Wis. Stat. § 939.645 (1)(b) (1989-90). The circuit court rejected respondent's contention that the enhancement provision is unconstitutional, Pet. App. A63, and sentenced respondent to four years' imprisonment for the aggra-

vated battery. *Id.* at A3-A4.[3] The court of appeals affirmed the conviction and sentence. Pet. App. A53-A62.

3. The Wisconsin Supreme Court reversed. Pet. App. A1-A52. It held that the sentencing enhancement provision of the "hate crimes" statute "violates the First Amendment directly by punishing what the legislature has deemed to be offensive thought and violates the First Amendment indirectly by chilling free speech." *Id.* at A7.

The court rejected the State's contention that the statute punishes only the racially based selection of the victim, and does not punish "bigoted thought." Pet. App. A8. The court stated that the enhancement provision "punishes the 'because of' aspect of the defendant's selection, the *reason* the defendant selected the victim, the *motive* behind the selection." *Id.* at A8. According to the court, the enhanced "punishment of the defendant's bigoted motive * * * directly implicates and encroaches upon First Amendment rights." *Id.* at A10; see *id.* at A14-A15.[4]

The court found support for its holding in *R.A.V.* v. *City of St. Paul*, 112 S. Ct. 2538 (1992). Pet. App. A15-A16. In *R.A.V.*, this Court struck down on First Amendment grounds a city ordinance that selectively punished only those "fighting words" that involved

[3] Respondent was also convicted of theft, but the jury did not find that respondent selected Riddick as a theft victim because of his race. Pet. App. A4 n.3, A55. The theft conviction is not before this Court.

[4] The court recognized that the statute as written does not specifically target subjective bias, bigotry, or prejudice, Pet. App. A11, and that the statute covers cases in which the defendant is not biased. *Id.* at A14 n.13. The court concluded, however, that the "intent and practical effect of the law" was "punishment of offensive motive or thought." *Id.* at A11.

"messages of 'bias-motivated' hatred." 112 S. Ct. at 2542, 2548. While noting that the ordinance in *R.A.V.* "is clearly distinguishable" from the Wisconsin sentencing enhancement law, Pet. App. A16, the state court relied on the principle of *R.A.V.*—that legislators may not express hostility to particular biases "through the means of imposing unique limitations upon speakers who * * * disagree." 112 S. Ct. at 2550. The court thought that principle to be relevant in this case, because "[t]he ideological content of the thought targeted by the hate crimes statute is identical to that targeted by the St. Paul ordinance—racial or other discriminatory animus." Pet. App. A16.[5]

The court also held the sentencing enhancement provision to be unconstitutionally overbroad, because the defendant's words would frequently be introduced as evidence of his discriminatory selection of the victim. Pet. App. A17-A19. The court reasoned that the evidentiary use of the defendant's words would have a "chilling effect" on free speech. *Id.* at A18.

The court purported to distinguish the hate crimes statute from federal and state antidiscrimination laws. Although noting that this Court has repeatedly rejected First Amendment challenges to those laws, Pet. App. A19-A21 & n.20, the court stated that antidiscrimination laws prohibit the "discriminatory act,"

[5] The court noted that in *Dawson* v. *Delaware*, 112 S. Ct. 1093, 1098 (1992), this Court held that the First Amendment does not bar consideration in a sentencing proceeding of the "elements of racial hatred" in the defendant's crime. The court, however, viewed that principle as inapplicable when the defendant is already subject to punishment for the underlying crime and the State then adds "to that criminal sentence a separate enhancer that is directed solely to punish the evil motive for the crime." Pet. App. A16 n.17.

and not the "mental process" of selecting the victim, which is the effect of the hate crimes statute. Pet. App. A20. Moreover, the court stated, antidiscrimination laws pose less of a threat to First Amendment values because they impose only civil, not criminal, penalties. *Id.* at A21.

Justice Abrahamson dissented, stating that while "[f]reedom of speech is the most treasured right in a free, democratic society," the sentencing enhancement statute "is a prohibition on conduct, not belief or expression." Pet. App. A23, A25. She concluded that, because "[t]he statute does nothing more than assign consequences to invidiously discriminatory acts," *id.* at A25, it is valid under the First Amendment. Justice Bablitch filed a separate dissent, arguing that the hate crimes statute is valid as a law "against discrimination, pure and simple," and does not punish thoughts, but "acting upon those thoughts." *Id.* at A27-A28. "The Constitution," he concluded, "allows a person to have bigoted thoughts and to express them, but it does not allow a person to act on them." *Id.* at A28.

SUMMARY OF ARGUMENT

Wisconsin law authorizes enhanced criminal penalties when the defendant intentionally selects his victim because of race, religion, color, or other protected status. Wis. Stat. § 939.645 (1989-90). The Wisconsin Supreme Court held that the State's enhancement provision violates the First Amendment by punishing bigoted thought and chilling protected speech. That conclusion is wrong for four reasons.

A. In *Dawson* v. *Delaware*, 112 S. Ct. 1093 (1992), this Court held that the First Amendment does not impose a per se bar to consideration in a sentencing proceeding of the beliefs that prompted the defendant's commission of a crime. Rather, such beliefs can be examined when they are relevant to a legitimate sentencing issue. In seeking to determine an appropriate sentence, courts have traditionally enjoyed broad freedom to consider the reasons for the crime and its consequences to victims. The same principles apply in sentencing for crimes in which the defendant selects his victim because of the victim's membership in a particular group. A State may permissibly conclude that such group-based targeting exacerbates the individual and social harm of the crime, and requires a greater degree of deterrence. Wisconsin's sentencing enhancement provision properly responds to those considerations.

B. The Wisconsin provision is also analogous to many federal and state antidiscrimination laws, which have long been recognized as valid under the First Amendment. There is no First Amendment right to engage in acts of discrimination. Just as the Constitution does not protect conduct with a discriminatory purpose in commercial transactions, it does not protect conduct with a discriminatory purpose in criminal "transactions." The long history of civil rights legislation in this country confirms that it is legitimate to punish acts that are committed with discriminatory intent. There is no persuasive reason for distinguishing Wisconsin's antidiscrimination provision from those other antidiscrimination laws.

C. In *R.A.V.* v. *City of St. Paul*, 112 S. Ct. 2538, 2548 (1992), this Court struck down on First Amendment grounds a municipal ordinance that singled out for punishment only those "fighting words" that expressed "messages of 'bias-motivated' hatred." *R.A.V.* is inapplicable here. Wisconsin's law punishes discriminatory conduct, not speech, symbolic

expression, or thought. The enhancement of punishment when the defendant selects his victim because of the victim's group affiliation does not punish thought in the abstract; it addresses the harms triggered by class-based criminal conduct. While the Constitution protects the right to harbor and express bigoted ideas, it does not confer the right to commit crimes based on those beliefs.

D. Finally, the Wisconsin law does not unconstitutionally chill protected speech. Although the defendant's words may be used as evidence that he intentionally selected the victim because of a protected characteristic, the same is true in any criminal case requiring proof of purpose or intent, including federal antidiscrimination prosecutions. The First Amendment does not bar the evidentiary use of words to prove the elements of a crime or to justify an enhanced sentence.

ARGUMENT

ENHANCING CRIMINAL PENALTIES WHEN THE DEFENDANT SELECTS THE VICTIM BECAUSE OF HIS RACE, RELIGION, COLOR, OR OTHER PROTECTED STATUS DOES NOT VIOLATE THE FIRST AMENDMENT

The First Amendment embodies this country's deep commitment to freedom of speech and thought. This country is also committed, however, to the protection of individuals from criminal activity that is aimed at them because of their race, religion, or other distinctive characteristic. Wisconsin's sentencing enhancement provision furthers the government's obligation to safeguard its citizens from such invidious crimes, and it does so without suppressing speech or punishing beliefs.

A. A Sentencing Court May Consider A Defendant's Selection Of His Victim Because Of The Victim's Protected Status

1. In *Dawson* v. *Delaware*, 112 S. Ct. 1093 (1992), this Court recognized that the First Amendment does not bar consideration of the defendant's associations and beliefs when they are relevant to a legitimate sentencing issue. In that case, the State introduced evidence at a capital sentencing hearing that the defendant had the words "Aryan Brotherhood" tattooed on his hand and that the Aryan Brotherhood was a "white racist prison gang that began * * * in response to other gangs of racial minorities." *Id.* at 1096. Dawson contended that the First Amendment "forbids the consideration in sentencing of any evidence concerning [protected] beliefs or activities," but this Court rejected that contention as "too broad." *Id.* at 1097. Noting that sentencing authorities have traditionally been able to draw on a "wide range of relevant material," *ibid.*, the Court concluded that "the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment." 112 S. Ct. at 1097.

The principle of *Dawson* applies to the Wisconsin penalty enhancement scheme. Wisconsin has authorized sentencing courts to impose a greater maximum sentence when the factfinder determines that the defendant "[i]ntentionally select[ed] the person against whom the crime * * * [was] committed * * * because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person * * *." Wis. Stat. § 939.645(1)(b) (1989-90). As *Dawson* makes clear, the presence of racial motive in

the selection of a crime victim is a permissible consideration in sentencing. 112 S. Ct. at 1097-1098. *Dawson* noted that in *Barclay* v. *Florida*, 463 U.S. 939 (1983), the Court had upheld the admission of "evidence of racial intolerance and subversive advocacy" where that evidence was "relevant to the issues involved." 112 S. Ct. at 1097.

The Court in *Dawson* found a constitutional violation only because the evidence admitted in that case was not shown to be relevant to the sentencing proceeding. 112 S. Ct. at 1097-1098. The Court emphasized, however, that if Dawson's membership in a white racist prison gang had been "tied in any way to the murder of Dawson's victim," or had been shown to be relevant to some other aggravating factor, such as the defendant's future danger to society, it would have been constitutional for the jury to consider it. 112 S. Ct. at 1098.

The Wisconsin Supreme Court sought to distinguish *Dawson* by stating that it is one thing to consider a defendant's "evil motive" in sentencing the defendant for a particular crime, but it is "quite a different matter to sentence for that underlying crime and then add a separate enhancer directed solely to punish the evil motive." Pet. App. A16 n.17. That distinction is unpersuasive. If "the elements of racial hatred" in the commission of a murder can make the difference between life imprisonment and a capital sentence, see *Barclay* v. *Florida*, 463 U.S. at 949 (plurality opinion), the sentence has been "enhanced" because of the "evil [racial] motive." In similar fashion, under the Wisconsin sentencing scheme the commission of aggravated battery may result in an enhanced sentence when the defendant's selection of his victim is animated by the victim's race.

Nor is *Dawson* inapplicable because the victim-selection enhancement in this case is embodied in a statute. Just as it does not violate the First Amendment for a judge to consider "the elements of racial hatred" in the defendant's crime, *Dawson*, 112 S. Ct. at 1097, it does not violate the First Amendment for the legislature to authorize such consideration. If a court in a particular case may consider the race-based selection of the victim in sentencing, it is constitutionally permissible for the legislature to direct courts to do so generally. See *Harmelin* v. *Michigan*, 111 S. Ct. 2680, 2703 (1991) (Kennedy, J., concurring) ("the responsibility for making these fundamental [sentencing] choices and implementing them lies with the legislature"); *Chapman* v. *United States*, 111 S. Ct. 1919, 1928 (1991) (the legislature "has the power to define criminal punishment without giving the courts any sentencing discretion").[6]

2. The principle that the First Amendment does not bar consideration of the racial elements in a crime follows from two basic characteristics of this country's sentencing system. First, the inquiry conducted by sentencing courts has traditionally been a wide-ranging one. As this Court has noted, "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States* v. *Tucker*, 404 U.S. 443, 446

[6] Respondent argues (Br. in Opp. 16) that *Barclay* and *Dawson* authorize consideration of racial selection only in connection with a "content-neutral statutory aggravating factor." Nothing in *Dawson* or *Barclay* suggests such a limitation. There is no reason grounded in the First Amendment for permitting a court to consider the racial selection of a crime victim only when the legislature has not specifically identified that factor as a relevant consideration.

(1972); see *United States* v. *Grayson*, 438 U.S. 41, 50 (1978). "[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." *Williams* v. *New York*, 337 U.S. 241, 246 (1949); see also 18 U.S.C. 3661; Fed. R. Crim. P. 32(c)(2).

This Court recently applied that principle in upholding the admission of victim impact evidence in a capital sentencing proceeding. *Payne* v. *Tennessee*, 111 S. Ct. 2597 (1991). The Court noted that "[w]hatever the prevailing sentencing philosophy, the sentencing authority has always been free to consider a wide range of relevant material," and that evidence of the "specific harm caused by the crime in question" belongs to a class of evidence "long considered by sentencing authorities." *Id.* at 2606, 2608. As *Payne* indicates, in-depth exploration of the defendant's character and the circumstances of his crime is deeply rooted in the sentencing traditions of this country.

Second, the States have considerable latitude in determining the appropriate goals to be served by their criminal sentencing systems, *Harmelin* v. *Michigan*, 111 S. Ct. 2680, 2704 (1991) (Kennedy, J., concurring), and the factors that their courts should consider in determining the appropriate sentence. That latitude extends to permitting a court to consider the particularized harm, and the broader injury to social values, caused by the defendant's conduct. *Payne* v. *Tennessee*, 111 S. Ct. at 2605 ("the assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the

elements of the offense and in determining the appropriate punishment"); *id.* at 2628 (Stevens, J., dissenting) ("an evaluation of the harm caused by different kinds of wrongful conduct is a critical aspect in legislative definitions of offenses and determinations concerning sentencing guidelines").

Those principles are inconsistent with the Wisconsin Supreme Court's view that the First Amendment bars a legislature from concluding that some states of mind accompanying the commission of a crime are deserving of special condemnation through enhanced punishment. If the Wisconsin court were correct, it would be impermissible to punish a spy more severely when his intention was to harm his country rather than to support the ideas of a spouse, or to punish a thief more severely when his motive was to satisfy greed rather than to feed his family. Such a rule would be contrary to the history of sentencing practices in this country.

3. In light of those principles, a State may permissibly determine that a crime warrants more severe punishment when the defendant has targeted a victim based on a factor such as his race. There is a broad consensus in our society that a defendant's selection of a victim because of the victim's membership in a racial, religious, or ethnic group inflicts harm above and beyond the crime itself.[7] Several factors support that conclusion.

First, a group-based crime inflicts a distinctive injury on the individual victim by instilling or rein-

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[7] That consensus is reflected in the fact that 46 States and the District of Columbia have enacted provisions designed to address the issue of hate crimes. See Anti-Defamation League of B'nai B'rith, *Hate Crimes Statutes: A 1991 Status Report*, App. C, at 24-26 (1991) (collecting hate-crime statutes).

forcing fears that he is exposed to danger simply because of his race, religious affiliation, or other group characteristic. While all victims of violent crime suffer a profound sense of personal invasion, the sense of vulnerability when one is attacked because of membership in a particular group adds a further dimension to the injury. Second, crimes based on race or religion harm not only the individual victims, but also other members of the victim's group. The selection of one group member for crime because of his group identity threatens the personal safety and security of other members of that group, solely because of their shared characteristic.[8]

In addition to those concerns that directly relate to harms to victims, a State may conclude that enhanced punishment of such crimes is needed to provide adequate deterrence. Criminals who select their victims because of membership in particular groups may act out of hate, or out of a sense that particular minorities are simply more vulnerable targets for criminal conduct. Because particular individuals may feel a greater incentive to commit group-based crimes, enhanced penalties for crimes against members of such groups may be necessary to deter those offenders from acting. Moreover, a State may determine that

[8] See S. Rep. No. 721, 90th Cong., 1st Sess. 7 (1967) ("Experience teaches that racial violence has a broadly inhibiting effect upon the exercise by members of the Negro community of their Federal rights to nondiscriminatory treatment."). Crimes based on the race or religion of the victim are "most unsettling to the victims because there is nothing they can do to alter the situation, nor is there anything that they should be expected to change. Not only is the individual who is personally touched by these offenses victimized, but the entire class of individuals residing in the community is affected." FBI, *Training Guide For Hate Crime Data Collection* 1 (1991).

group-based crimes are more likely to stimulate either copycat or retaliatory "hate crimes." A State may take special measures to deter crimes that could stimulate a cycle of violence in the community. In short, the criminal justice system has legitimate reasons for enhancing sentences for defendants who target and commit crimes against members of particular groups.[9]

4. Although the First Amendment does not bar the consideration in a sentencing proceeding of the defendant's reasons for selecting a particular victim, the Constitution does bar punishment of the defendant for his "abstract beliefs" when they "have no bearing on the issue being tried," but simply are viewed as "morally reprehensible." *Dawson* v. *Delaware*, 112 S. Ct. at 1098-1099. Wisconsin's enhancement mechanism does not operate in that fashion.

The Wisconsin law authorizes an enhanced sentence only when there is a connection between the crime and the defendant's mental processes: the defendant must have selected the "person against whom the crime * * * is committed * * * because of" the victim's racial, religious, or other protected status. Wis. Stat. § 939.645(1)(b) (1989-90). There is nothing to suggest that the law authorizes punishment for abstract beliefs unrelated to the defendant's culpabil-

[9] A State may apply that enhancement not only when the victim is an actual member of the targeted group, but also when the victim is selected " 'because of the actor's belief or perception regarding' the victim's status 'whether or not the actor's belief or perception was correct,' " as the amended version of Section 939.645 does. Pet. App. A12 n.12 (quoting Wis. Stat. § 939.645 as amended in 1992). The definition of the law's coverage by reference to the actor's belief or perception seeks to deter any defendant from selecting his victim because of his understanding about the victim's group status; the interest in punishing such crimes does not evaporate simply because the defendant's belief turned out to be wrong.

ity for the crime of which he was convicted. In a particular case, of course, a sentencing judge might overstep the bounds of the First Amendment by enhancing a sentence based solely on the defendant's "abstract beliefs" involving bigotry or prejudice. That risk, however, is present in any sentencing system that allows a measure of discretion to the sentencing authority; it does not render the statute facially invalid.

Sentencing judges may permissibly consider the defendant's selection decision as bearing on the degree of trauma, humiliation, and degradation inflicted on the victim; they may evaluate the injury to the sense of safety and personal security of other members of the same class; and they may take into account the need to deter similar crimes by the defendant or others. None of those purposes punishes "abstract beliefs," and none runs afoul of the First Amendment.

B. Discrimination In The Selection Of A Crime Victim May Be Punished Like Any Other Act Of Discrimination

Beyond the particularized concerns of the sentencing system, Wisconsin's enhancement provision is valid for an additional reason: Wisconsin's protection of particular groups through the criminal process is a form of antidiscrimination law. The constitutionality of the provision is confirmed by this Court's decisions upholding other federal and state antidiscrimination statutes.

1. In *Runyon* v. *McCrary*, 427 U.S. 160 (1976), this Court held that 42 U.S.C. 1981 prohibits private schools from excluding students on the basis of race. The Court also ruled that that prohibition of discriminatory acts does not violate the First Amendment. The Court explained:

> [I]t may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle. As the Court stated in *Norwood* v. *Harrison*, 413 U.S. 455 [(1973)], "the Constitution . . . places no value on discrimination," *id.* at 469, and while "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protections. * * *" *Id.* at 470.

427 U.S. at 176; see also *Railway Mail Ass'n* v. *Corsi*, 326 U.S. 88, 93-94 (1945) (labor union has no right to discriminate on the basis of race, creed, or color). The Court made the same point in *Hishon* v. *King & Spalding*, 467 U.S. 69 (1984), where it held that the application of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, to sex discrimination in a private law firm does not "infringe constitutional rights of expression or association." 467 U.S. at 78.

More recently, the Court applied the same constitutional rule in upholding state laws forbidding discrimination in membership by private social organizations. *Roberts* v. *United States Jaycees*, 468 U.S. 609, 628 (1984); *Board of Directors of Rotary Int'l* v. *Rotary Club*, 481 U.S. 537, 544-549 (1987); *New York State Club Ass'n* v. *New York City*, 487 U.S. 1, 10-15 (1988). In *Jaycees*, for example, the Court explained that the state law at issue did not facially "aim at the suppression of speech," nor did it "distinguish between prohibited and permitted activity on the basis of viewpoint," or permit enforcement based

on such criteria. 468 U.S. at 623. The Court concluded that because the state law was narrowly tailored to serve the compelling interest in eradicating discrimination, it did not infringe rights protected by the First Amendment. *Id.* at 622-629.

The principle underlying those cases is equally applicable here. Just as federal and state antidiscrimination statutes seek to combat invidious discrimination in social, academic, and commercial settings, Wisconsin seeks to combat the discriminatory targeting of particular classes of persons in criminal settings. The Constitution does not protect intentional discrimination in social, academic, and commercial transactions; it surely does not protect such discrimination in criminal "transactions." [10]

2. Not only the decisions discussed above, but this country's long history of civil rights legislation refutes any suggestion that the First Amendment pre-

[10] The state court analyzed Wis. Stat. § 939.645 (1989-90) as if it covered only subjective bias or hate, but the court recognized that "the statute as written may extend to situations where the actor in fact is not biased." Pet. App. A14 n.13; *id.* at A11 ("the statute does not specifically phrase the 'because of . . . race, religion, color [etc.]' element in terms of bias or prejudice"). The court merely speculated, based on "the history of anti-bias statutes" in other States, *id.* at A11, that the Wisconsin legislature must have intended to punish biased thought. Read naturally, however, the "intentional selection" provision is a classic antidiscrimination law that focuses on the actor's choice of victim because of status, not on the ideology that may have motivated that choice. Cf. *Bray* v. *Alexandria Women's Health Clinic*, No. 90-985 (Jan. 13, 1993), slip op. 5 ("We do not think that the 'animus' requirement [of 42 U.S.C. 1985(3)] can be met only by maliciously motivated, as opposed to assertedly benign (though objectively invidious), discrimination against women. It does demand, however, at least a purpose that focuses upon women *by reason of their sex.*").

vents the enhancement of punishment in cases of crimes based on intentional discrimination.

a. Congress has enacted laws prohibiting intentional discrimination against racial or other groups since the Reconstruction era. In 1866, Congress enacted the predecessor to 18 U.S.C. 242, which criminalized, among other things, the infliction, by a person acting under color of state law, of "different punishment, pains, or penalties * * * by reason of [the victim's] color or race, than [are] prescribed for the punishment of white persons." [11] Soon thereafter, Congress enacted the predecessors of 42 U.S.C. 1981 and 1982, which prohibit intentional racial discrimination in the making and enforcement of private contracts and in the sale or rental of real or personal property. *Saint Francis College* v. *Al-Khazraji*, 481 U.S. 604 (1987); *Shaare Tefila Congregation* v. *Cobb*, 481 U.S. 615 (1987). Those statutes, even though they require proof of intentional discrimination, have never been thought to raise First Amendment concerns. In *R.A.V.* v. *City of St. Paul*, 112 S. Ct. 2538 (1992), this Court cited 18 U.S.C. 242 and 42 U.S.C. 1981 and 1982 as examples of statutes that prohibit conduct on grounds other than its expressive content, and thus are constitutional even when the conduct in question expresses ideas of hostility to a particular group. 112 S. Ct. at 2546-2547.

[11] Act of April 9, 1866, § 2, 14 Stat. 27. A table tracing the evolution of 18 U.S.C. 242 is contained in the appendix to the opinion of Justice Frankfurter in *United States* v. *Williams*, 341 U.S. 70, 82 (1951). Section 242 also prohibits "the deprivation [under color of law] of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." 18 U.S.C. 242. A violation of that prohibition does not depend on a showing of racial intent. *United States* v. *Classic*, 313 U.S. 299, 326-327 (1941).

Just this Term, the Court reaffirmed that a civil action under 42 U.S.C. 1985(3) requires proof of "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action" to establish liability. *Bray* v. *Alexandria Women's Health Clinic*, No. 90-985 (Jan. 13, 1993), slip op. 3-4, quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). Under that rule, private individuals are subject to suit under Section 1985(3) only when they have selected a victim because of the victim's "class-based" identity, and perhaps because of race alone. *Carpenters* v. *Scott*, 463 U.S. 825, 836 (1983). If the Wisconsin Supreme Court were correct in stating that it violates the First Amendment to punish the "racial or other discriminatory animus" underlying specific conduct, Pet. App. A16, this Court's effort to prevent Section 1985(3) from foundering on "constitutional shoals" by creating "general federal tort law," *Griffin*, 403 U.S. at 102, would actually have made the statute an unconstitutional vehicle for suppressing protected thought.

b. In recent years, Congress has enacted additional antidiscrimination laws and has extended the protection of civil rights legislation to persons discriminated against on grounds other than race. For example, the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, provides a wide array of civil protections against private discrimination. See, *e.g.*, 42 U.S.C. 2000a(a) (prohibiting discrimination in public accommodations "on the ground of race, color, religion, or national origin"); 42 U.S.C. 2000e-2(a)(1) (prohibiting discrimination in employment "because of * * * race, color, religion, sex, or national origin"). Later legislation followed the same pattern. See 42 U.S.C. 3604 (prohibiting discrimination in housing "because of race, color, religion, sex, familial status, or national origin"); 42 U.S.C. 12112, 12182 (Supp. II 1990) (prohibiting discrimination in employment and public accommodations on the basis of disability).

Congress has also employed criminal remedies in combatting discrimination. In 1968, Congress criminalized interference by force or threat of force with any person "because of his race, color, religion or national origin" with respect to a wide variety of civil rights, including attending public school, enjoying the benefits of federal programs, enjoying employment or union membership, serving on state juries, traveling by common carrier, and using public accommodations.[12] 18 U.S.C. 245(b)(2). The principal purpose of that provision was to combat "racially motivated acts of violence." *Johnson* v. *Mississippi*, 421 U.S. 213, 226 (1975).[13] Similarly, Congress made it a crime for any person to interfere with housing rights "because of [a person's] race, color, religion, sex, handicap * * *, familial status * * *, or national origin." 42 U.S.C. 3631(a).

Those provisions reflect Congress's continuing effort to protect members of racial and other groups from offenses committed against them because of their status. The government has often used those provisions to prosecute bias-related crime. See note 20, *infra*. Wisconsin's law, like those of other States, similarly attempts to deal with the problem of bias-

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[12] Pub. L. No. 90-284, tit. I, § 101(a), 82 Stat. 73.

[13] As the legislative history explained, Section 245 was enacted "to strengthen the capability of the Federal Government to meet the problem of violent interference, for racial or other discriminatory reasons, with a person's free exercise of civil rights." S. Rep. No. 721, 90th Cong., 1st Sess. 3 (1967); H.R. Rep. No. 473, 90th Cong., 1st Sess. 5 (1967) (Section 245 "is designed to meet the problem of present-day racial violence").

related crime, and it is equally compatible with the Constitution.[14]

3. The Wisconsin Supreme Court offered two grounds for concluding that the Wisconsin statute, unlike other antidiscrimination laws, violates the First Amendment. First, the court stated that Wisconsin's sentencing enhancement provision "is solely concerned with the subjective motivation of the actor," while other antidiscrimination laws "involve objective acts of discrimination." Pet. App. A20. That distinction is untenable.

Both federal antidiscrimination law and Wis. Stat. § 939.645 (1989-90) are concerned with "discriminatory acts." Under both, the unlawfulness of those acts is generally established by proof of the discriminatory reason for the actor's "selection decision." [15]

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[14] Because most crime is prosecuted on the state level, and because the problem of bias-related crime transcends federal resources, the availability of state legislation to deal with such crime is critical. The federal government, of course, has a unique role in protecting civil rights under the Post-Civil War Amendments, but federal antidiscrimination law is not distinguishable from state hate crime laws on that basis. See *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 250 (1964) (upholding Civil Rights Act of 1964 under the Commerce Clause, U.S. Const. Art. I, § 8, cl. 3); see also *United States* v. *Lane*, 883 F.2d 1484, 1490-1492 (10th Cir. 1989) (upholding 18 U.S.C. 245(b)(2)(C) under the commerce power), cert. denied, 493 U.S. 1059 (1990). States may similarly draw on their police power to protect individuals against bias-related crime.

[15] An exception to that rule exists in disparate impact discrimination cases, where a violation is established based on the effect of a particular practice, not the intent of the actor. See *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 986-987 (1988); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); see also Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(a), 105 Stat. 1074, to be codified at 42 U.S.C. 2000e-2(k).

Pet. App. A20 & n.21. The discriminatory act occurs when the protected status of the victim "played a motivating part" in the actor's decision. *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 250 (1989) (plurality opinion). The "subjective mental process" of the actor (Pet. App. A20 & n.21) is therefore the ultimate issue. See, *e.g.*, *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 256 (1981) (ultimate burden" of plaintiff in a Title VII case is to show "intentional discrimination").

Second, the state court said that the federal antidiscrimination statutes carry civil rather than criminal sanctions. Pet. App. A21. That suggestion is incorrect. Purposeful discrimination, in selected contexts, has long violated federal criminal law. See 18 U.S.C. 242, 243, 245; 42 U.S.C. 3631. It is fully appropriate for the States, which bear the primary role in protecting individuals against crimes, to take similar action in response to hate crimes.

C. The Wisconsin Statute Punishes Criminal Conduct, Not Speech Or Ideas

In *R.A.V.* v. *City of St. Paul*, 112 S. Ct. 2538 (1992), this Court invalidated a municipal ordinance that singled out, from among other "fighting words," symbolic speech that expressed messages of "'bias-motivated' hatred." *Id.* at 2548. *R.A.V.* took as its premise that the ordinance was aimed at the expressive content of the proscribed conduct. Because Wisconsin's law is aimed at the discriminatory criminal act itself, rather than at the expression of ideas, *R.A.V.* is inapplicable to this case.

1. The First Amendment protects the right to hold racist or discriminatory beliefs and to express racist or discriminatory views; government can neither proscribe beliefs nor punish the expression of ideas with

which it disagrees. *United States* v. *Eichman*, 496 U.S. 310 (1990); *Texas* v. *Johnson*, 491 U.S. 397, 414, 418 (1989); *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 234-235 (1977); *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 408 (1950); *West Virginia Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943).

An individual's right to speak and believe as he sees fit, however, does not embrace the right to commit crimes against particular persons because of their group affiliation. When such crimes are committed, the State may take account of that fact and enhance the punishment to protect group members against crimes targeted at them. That purpose has nothing to do with suppressing disfavored speech or thought.

It is questionable whether the "message" sent by a violent crime against another person could ever constitute protected speech. A political assassination is in some sense the ultimate means of sending a message of opposition to government policy, but a message communicated in that way cannot possibly be thought to enjoy any First Amendment protection.[16] Even if a crime against another person because of his group affiliation could be said to have expressive aspects, the expressive component of the conduct is not what Wis. Stat. § 939.645 (1989-90) targets. The enhancement scheme deals with the harms resulting from the crime; it does not "proscribe particular conduct *because* it has expressive elements." *Texas* v. *Johnson*,

[16] See *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labelled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."); *Barnes* v. *Glen Theatre, Inc.*, 111 S. Ct. 2456, 2462 (1991) (plurality opinion); *Dallas* v. *Stanglin*, 490 U.S. 19, 25 (1989).

491 U.S. at 406; see *R.A.V.*, 112 S. Ct. at 2542; *United States* v. *O'Brien*, 391 U.S. 367, 382 (1968).

The Wisconsin Supreme Court acknowledged that the Wisconsin law does not target expression.[17] It reasoned, however, that, because the underlying conduct (here, an aggravated battery) is already subject to criminal prosecution, the sentencing enhancement provision must have been aimed at the ideology of prejudice that presumably animated the defendant's selection of his victim. Pet. App. A8, A10. The court concluded that the law therefore creates a "thought crime," and held that "[p]unishment of one's thought, however repugnant the thought, is unconstitutional." *Id.* at A14-A15, A20 n.21.

The flaw in the court's analysis is that the Wisconsin law does not punish bigotry in the abstract; the enhanced punishment is available only when the State shows that the defendant victimized a class member because of his status. Individuals remain free to hold racist beliefs and to express racist ideas; what they may not do is act on those views by committing crimes against protected persons. As this Court has explained:

> [A]cts of invidious discrimination * * * cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit. Accordingly, like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such [discriminatory] practices are entitled to no constitutional protection.

Roberts v. *United States Jaycees*, 468 U.S. at 628.

[17] Pet. App. A15 n.15 ("Nor is it argued that a hate crime is protected expressive conduct. It is not.").

2. In *R.A.V.* v. *City of St. Paul*, a municipal ordinance made it a misdemeanor to use "fighting words" that inflicted emotional harm on the basis of race, color, creed, religion, or gender.[18] *R.A.V.* held that, even in a category of "proscribable" speech, the selective prohibition of expression based on its subject matter violates the First Amendment principle that government may not suppress speech on the basis of its content or because the government is hostile to a particular message. 112 S. Ct. at 2545. The Court explained that "[t]he First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." *Id.* at 2547. "[M]ajority preferences," the Court stated, "must be expressed in some fashion other than silencing speech on the basis of its content," *id.* at 2548, or by "imposing unique limitations upon speakers who * * * disagree." *Id.* at 2550.

The concerns expressed in *R.A.V.* about the suppression of disfavored speech are not implicated here. The Wisconsin law does not silence speech or censor thought; it deals with conduct. Unlike the St. Paul ordinance, which explicitly barred any "symbol," "appellation," or "graffiti" that expressed "messages

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[18] The ordinance in *R.A.V.* stated:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

St. Paul Legis. Code § 292.02 (1990), quoted in *R.A.V.*, 112 S. Ct. at 2541. The Minnesota Supreme Court construed the ordinance to apply only to "fighting words." 112 S. Ct. at 2541, citing *In re Welfare of R.A.V.*, 464 N.W.2d 507, 510 (Minn. 1991).

of bias-motivated hatred and in particular * * * messages based on virulent notions of racial supremacy," 112 S. Ct. at 2541, 2548, Wisconsin does not punish any form of expression or disfavored "messages"; it punishes victim-selective crimes.

In *R.A.V.*, the Court stated that "[w]hat we have here, it must be emphasized, is not a prohibition of fighting words that are directed at certain persons or groups (which would be *facially* valid if it met the requirements of the Equal Protection Clause)." *Id.* at 2548. In this case, what Wisconsin has *is* a prohibition of criminal conduct "directed at certain persons or groups," *ibid.*; the law does not work the direct, content-based regulation of "expression," "messages," or "speech" (*id.* at 2549) that the Court condemned in *R.A.V.* In the terms used by the Court in *R.A.V.*, the Wisconsin statute "does not target conduct on the basis of its expressive content"; the acts penalized by the Wisconsin statute therefore "are not shielded from regulation merely because they express a discriminatory idea or philosophy." 112 S. Ct. at 2546-2547.[19]

Wisconsin's statute is quite different from respondent's hypothetical flag-burning statute in which public burning is generally prohibited and a "penalty enhancer * * * would apply whenever a person commits the offense * * * 'because of' his opposition to

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[19] It is not surprising that *R.A.V.* casts no doubt on Wisconsin's sentencing enhancement scheme, given that the Court decided *Dawson* v. *Delaware*, *supra*, only months before, and *R.A.V.* did not suggest that its holding in any way conflicted with *Dawson*. Moreover, the opinion in *R.A.V.* underscored that the concerns raised by the content-based regulation of speech do not apply to antidiscrimination laws, which (like Wisconsin's law) aim at "conduct" and only "incidentally" affect speech. 112 S. Ct. at 2546-2547.

the policies of the government." Br. in Opp. 8. Such an enhancement would be invalid under *Texas* v. *Johnson*, 491 U.S. 397 (1989), because it would punish expressive conduct based on its content. But it is not true that "this is precisely the effect of Wisconsin's hate crimes law." Br. in Opp. 8. The Wisconsin statute does not enhance a defendant's punishment because the offense is committed to express opposition to a particular racial or religious group, or even because the defendant harbors bigoted beliefs. It provides for enhancement if the defendant has selected his victim because of the victim's protected status, regardless of whether the defendant is biased against members of that group, and regardless of whether the defendant acted with the desire to make a statement about his beliefs. Moreover, respondent's hypothetical statute would have no purpose or effect other than to deter and punish protected beliefs and their expression. In contrast, enhanced punishment for the selection of a victim "because of" the victim's racial or protected status responds directly to the harms inflicted on victims and on society by the targeting of victims based on their status.

D. The Wisconsin Statute Does Not Unconstitutionally Chill Protected Speech

As a separate First Amendment objection, the Wisconsin Supreme Court held that the enhancement statute has an impermissible "chilling effect" on free speech. Pet. App. A17. The court based that conclusion on the fact that "speech may often be used as circumstantial evidence to prove the actor's intentional selection." *Id.* at A18. That analysis is incorrect.

The First Amendment does not forbid the use of words to establish the elements of a crime or to prove

the defendant's motive or intent. The best available evidence of intent often comes from what the defendant has said. Any issue that requires proof of an individual's purpose or intent therefore may depend on proof of the spoken or written word or of expressive conduct. If that evidentiary use of speech violated the Constitution, much of the criminal law would be unenforceable; this Court has made clear that the First Amendment does not have that effect. For example, in *Street* v. *New York*, 394 U.S. 576, 594 (1969), the Court ruled that a State may not directly punish protected speech, but it noted that "nothing in this opinion would render the conviction impermissible merely because an element of the crime was proved by the defendant's words rather than in some other way." See also *Cox* v. *Louisiana*, 379 U.S. 559, 563 (1965).

Proof of discriminatory purpose is no exception. This Court has found no constitutional bar to using the defendant's speech in assessing claims of discrimination. See, *e.g.*, *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion) (noting that "remarks at work" revealing "sex stereotypes" were relevant to employment discrimination claim). Likewise, when defendants are charged with racially motivated crimes, courts routinely admit evidence of the defendant's speech or associations to show the necessary discriminatory purpose and intent, without any suggestion that to do so violates First Amendment rights.[20]

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[20] See, *e.g.*, *United States* v. *McInnis*, 976 F.2d 1226, 1230-1232 (9th Cir. 1992) (defendant's shouting of racial epithets at black neighbors and possession of items emblazoned with swastikas admissible to establish his racial hatred and his acting on that hatred in firing gun at neighbors, thus interfering with their occupancy of their home on the basis of

In this case, the Wisconsin law does not prohibit or punish speech or expression; words may simply be relevant to the issue of "intentional selection" of the victim because of the victim's particular status. Often, that same evidence would be admissible in the trial of the underlying crime, to establish the defendant's motive or the circumstances surrounding the event, and that evidentiary use has never been found to be troublesome under the First Amendment. The Wisconsin statute therefore does not have the effect of unconstitutionally "chilling" protected speech.

CONCLUSION

The judgment of the Wisconsin Supreme Court should be reversed.

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race, in violation of 42 U.S.C. 3631); *United States* v. *Gresser*, 935 F.2d 96, 101 (6th Cir.) (shouting of racial epithets admitted in prosecution based on cross-burning outside of black family's residence), cert. denied, 112 S. Ct. 239 (1991); *United States* v. *Skillman*, 922 F.2d 1370, 1372-1374 (9th Cir. 1990) (racist statements and desire to associate with "skinheads" admissible to show racial animus in prosecution for burning cross on black family's lawn), cert. dismissed, 112 S. Ct. 353 (1991); *United States* v. *Lane*, 883 F.2d 1484, 1495-1496 (10th Cir. 1989) (defendant's criticism of radio talk show host's derision of the Ku Klux Klan and perceived slights to the white race admissible in prosecution for killing the host in violation of 18 U.S.C. 245); *United States* v. *Ebens*, 800 F.2d 1422, 1427-1430 (6th Cir. 1986) (racist remarks made to Asian man admissible to show defendant's intent to interfere with victim's use of public facility and motivation in killing him); *United States* v. *Redwine*, 715 F.2d 315, 319-322 (7th Cir. 1983) (prior racist comments admissible to show racially motivated harassment and fire bombing of black family's house), cert. denied, 467 U.S. 1216 (1984); *United States* v. *Franklin*, 704 F.2d 1183, 1188 (10th Cir. 1983) (racist statements and beliefs admissible to show that killings occurred "because of the[] race" of the victim), cert. denied, 464 U.S. 845 (1983).

Respectfully submitted.

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JANUARY 1993

APPENDIX

Wis. Stat. § 939.645 (1989-90) provides:

> **Penalty; crimes committed against certain people or property.** (1) If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2):
>
> (a) Commits a crime under chs. 939 to 948.
>
> (b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property which is damaged or otherwise affected by the crime under par. (a) because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.
>
> (2)(a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is $10,000 and the revised maximum period of imprisonment is one year in the county jail.
>
> (b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is $10,000 and the revised maximum period of imprisonment is 2 years.
>
> (c) If the crime committed under sub. (1) is a felony, the maximum fine prescribed by law for the crime may be in-

creased by not more than $5,000 and the maximum period of imprisonment prescribed by law for the crime may be increased by not more than 5 years.

(3) This section provides for the enhancement of the penalties applicable for the underlying crime. The court shall direct that the trier of fact find a special verdict as to all of the issues specified in sub. (1).

(4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction for that crime.

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